

STATE OF MICHIGAN
COURT OF APPEALS

KRISTEN CASSAVAUGH and LOREL EVANS,

Plaintiffs-Appellants,

v

WELLS FARGO BANK, Personal Representative
of the Estate of KENNETH ANDERSON,

Defendant-Appellee.

UNPUBLISHED

October 13, 2005

No. 257880

Marquette Probate Court

LC No. 84-024707-DA

Before: O’Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

In this action involving issues of trustee liability with respect to apparent errors in the preparation of an estate tax return back in 1985, plaintiffs appeal as of right the order granting defendant’s motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiffs alleged that after the death of their mother in 2001, they discovered that defendant violated its duty to properly supervise the administration of a trust created by their father years earlier. Plaintiffs brought an action for negligence, breach of fiduciary duty, and breach of contract. Plaintiffs sued defendant, in part, over mistakes made in a 1985 tax return prepared for plaintiffs’ father’s estate¹ by certified public accountant Delbert Larson, whom defendant hired. Plaintiffs alleged that after the death of their father, defendant, as a professional trustee, employed Larson to assist defendant with certain designations and tax filings, including the preparation and filing of the 706 Estate Tax Return on which Larson improperly calculated a Qualified Terminable Interest Property (QTIP) election. Plaintiffs further alleged that following the death of their mother, when her estate tax return was being prepared, a determination was made that the 1985 QTIP election had been improperly calculated. Plaintiffs contended that it became necessary to employ accountants, attorneys, and other consultants to file appropriate documents with the IRS in order to secure review and reconsideration of the 1985 QTIP election and its impact on their mother’s estate tax return. Plaintiffs acknowledge that they were able to partially fix the errors committed by Larson; however, they had to pay approximately \$80,000

¹ Plaintiffs’ father passed away in 1984.

more in taxes than would have been required had their father's estate tax return been properly prepared in the first place, plus they incurred other expenses, including the costs associated with correcting the problem.

Plaintiffs sought to hold defendant liable for the following reasons:

Improperly filing the 706 Tax Return with an improper calculation of the QTIP election;

Failing to monitor, supervise, direct, and evaluate the professional services furnished by [Larson] to the Trustee in 1985;

Fail[ing] to identify the mistake until review of the Estate tax returns for purposes of filing [their mother's estate tax return];

[Committing] other acts of malfeasance[.]

Plaintiffs also pointed to the trust document creating their father's revocable living trust, arguing that it specifically called for two testamentary trusts to be set up. However, only one of the testamentary trusts was ever created. Thus, plaintiffs assert, not only did defendant commit negligence and breach its fiduciary duties in using an accountant unskilled in estate tax planning to handle their father's estate tax return, but it also failed to carry out the specific directives of their father's revocable living trust.

Defendant asserted that the statutory grant of authority for trustees to hire and act on the advice of accountants "without independent investigation," MCL 700.7401(2)(v), was dispositive. Defendant asserted that any mistake made by Larson was insufficient to establish that he was not qualified to do the job defendant hired him to do. After a hearing, the trial court concluded as follows in its written opinion:

In this case, the Court determines that a mistake by a licensed^[s] certified public accountant, which is not drawn to the attention of a personal representative or trustee who has the skills necessary to perform the work himself or herself, does not subject the fiduciary to liability for the damages which result from the accountant's mistake. Any liability created must be asserted against the individual who made the error. Accordingly, Defendant is entitled to dismissal of Counts I and II (Negligence and Breach of Fiduciary Duty). Defendant is also entitled to dismissal of Count III (Breach of Contract), because there was no contract between them and the Personal Representative.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Our analysis begins with the determination of the appropriate law to be applied to the facts of the case. Below, the argument and analysis quickly focused on the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.* However, in 1985, the year in which the activities at issue occurred, the Revised Probate Code (RPC), MCL 700.1 *et seq.*, was in effect, not EPIC. MCL 700.8101(1) provides that EPIC took effect on April 1, 2000, and it further provides:

(2) Except as provided elsewhere in this act, on this act's effective date, all of the following apply:

(a) The act applies to a governing instrument executed by a decedent dying after that date.

(b) The act applies to a proceeding in court pending on that date or commenced after that date regardless of the time of the decedent's death except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of the infeasibility of applying this act's procedure.

(c) A fiduciary . . . holding an appointment on that date continues to hold the appointment, but has only the powers conferred by this act and is subject to the duties imposed with respect to an event occurring or action taken after that date.

(d) This act does not impair an accrued right or an action taken before that date in a proceeding. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that commences to run by the provision of a statute before this act's effective date, the provision remains in force with respect to that right.

(e) A rule of construction or presumption provided in this act applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent.

MCL 700.8101(2)(a) is not applicable here, and subsection (2)(b) clearly applies only to procedural statutes and rules. MCL 700.8101(2)(c) indicates that a fiduciary, such as defendant trustee, is subject to the duties imposed by EPIC in regard to events after April 1, 2000. The corollary to this language would be that a fiduciary is subject to the duties imposed by the RPC in regard to events before April 1, 2000. Moreover, the language of MCL 700.8101(2)(d) suggests that the RPC would remain in effect under the circumstances presented. See *In re Cummin Estate*, 258 Mich App 402, 408-409; 671 NW2d 165 (2003)(Wilder, J). Furthermore, simple legal sensibility dictates that defendant's legal duties, obligations, and liability as a trustee should be measured by the law as it stood in 1985 when the challenged actions occurred, as opposed to law that became effective approximately 15 years later.

MCL 700.818(2) of the RPC, repealed by 1998 PA 386, directly addressed trustee liability and provided:

A trustee is personally liable for obligations arising from ownership or control of property of the trust estate, or for torts committed in the course of administration of the trust estate, only if he is personally at fault or if the obligation or tort results from an act or omission of the trustee's agent or employee or a person retained by the trustee.

We note that under EPIC, MCL 700.7306(2) provides, “A trustee is personally liable for an obligation arising from ownership or control of the trust estate property or for a tort committed in the course of administration of the trust estate only if the trustee is personally at fault.” MCL 700.818(2) not only allowed for trustee liability for torts committed in the course of administration of the trust estate where the trustee was personally at fault, but also where the tort results from acts or omissions by a person retained by the trustee. With respect to MCL 700.7306(2), legal commentators observed:

This section is similar to prior law stated in RPC § 818, MCL 700.818[.] However, the RPC made the trustee personally liable for an obligation or tort resulting from an act or omission of the trustee’s agent or employee or any other person retained by the trustee. This extension of personal liability is not included in § 7306. [Institute of Continuing Legal Education, Commentary to the EPIC (2005 ed), p 375.]

MCL 700.818’s implications in the case at bar are evident, where plaintiffs have contended that Larson’s actions in preparing the estate taxes were negligent. Moreover, plaintiffs are entitled to bring an action for negligent hiring and direction, which claims go to aspects of personal fault relative to defendant “committed in the course of administration of the trust estate.” Given the plain language of MCL 700.818(2), the fact that defendant was authorized to hire an agent or person to prepare the estate tax return does not cloak it with immunity. Even under the EPIC and MCL 700.7306(2)(personal fault), plaintiffs could pursue an action for negligent hiring and direction. The trial court erred in concluding that “[a]ny liability created must be asserted against the individual who made the [tax] error.” Additionally, MCL 700.813, repealed by 1998 PA 386, provided that a trustee shall deal with the trust assets in a manner that would be observed by a prudent man,² and where a trustee “has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.” This language is comparable to MCL 700.7302 under the EPIC. There is a heightened duty for a professional trustee such as defendant.

Finally, defendant’s reliance on MCL 700.7401(2)(v) is misplaced. This provision grants, in general, authority to a trustee to pay reasonable compensation to, among others, an accountant “for the purpose of advising or assisting the trustee in the performance of an administrative duty [and authority] to act without independent investigation upon such a person’s recommendation[.]” MCL 700.826(e) of the RPC, repealed by 1998 PA 386, contained similar language. The language from these statutes does not relate to the specific question of trustee liability, which is controlled or governed by other provisions as indicated above. Moreover, permitting a trustee to act without an independent investigation *of a person’s recommendation* does not entail hiring and direction issues, such as negligence or breach of fiduciary duty in the process of selecting the person to perform work for the trust estate in the first place and negligence or breach of fiduciary duty in failing to provide the information and direction

² See also MCL 700.821, repealed by 1998 PA 386 (prudent man standard for trustees), and MCL 700.7401(1)(reasonable and prudent person standard for trustees).

necessary for the person to properly perform his or her task. The trial court erred in granting summary disposition in favor of defendant. On remand, the parties and the court shall proceed in accord with the RPC as reflected in this opinion.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ William B. Murphy